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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

vs.

WALKER RIVER IRRIGATION
DISTRICT, a corporation, *et al.*

Defendants.

Case No. 3:73-cv-00127 MMD-WGC

**NEVADA DEPARTMENT
OF WILDLIFE'S
ANSWER TO
SECONDED AMENDED
COUNTERCLAIM**

Counterdefendant, State of Nevada, ex rel. its Nevada Department of Wildlife (“NDOW”), hereby answers the Second Amended Counterclaim of the Walker River Paiute Tribe filed herein on May 3, 2019 (the “Second Amended Counterclaim”) as follows:

I. INTRODUCTION

1. This Answer is made subject to the provisions of the Stipulated Scheduling Order and Discovery Plan dated March 7, 2019 (ECF No. 2437) which provides that only answers and affirmative defenses are allowed, and which provides that no counterclaims are required or permitted. The allegations contained in paragraph 1 of the Second Amended Counterclaim consist of legal conclusions that do not require a response. To the extent that a response is required, NDOW denies them.

...

2. The allegations contained in paragraph 2 of the Second Amended Counterclaim consist of legal conclusions that do not require a response. To the extent that a response is required, NDOW denies them.

3. The allegations contained in paragraph 3 of the Second Amended Counterclaim consist of legal conclusions that do not require a response. To the extent that a response is required, NDOW denies them.

II. JURISDICTION

4. NDOW admits that this court retains continuing jurisdiction of the Court over the waters of the Walker River and its tributaries in California and Nevada under the Final Decree. The remaining allegations contained in paragraph 4 of the Second Amended Counterclaim consist of legal conclusions that do not require a response. To the extent that a response is required, NDOW denies them.

III. PARTIES

5. On information and belief, NDOW admits the allegations contained in paragraph 5.

6. NDOW admits that it is a claimant to the waters of the Walker River and its tributaries and also to groundwater. NDOW is without sufficient information to admit or deny the remaining allegations of paragraph 6, and on that basis, denies them.

IV. GENERAL ALLEGATIONS

7. The allegations in paragraph 7 of the Second Amended Counterclaim refer to documents which speak for themselves. To the extent that a response is required, NDOW denies the allegations.

8. The allegations in paragraph 8 of the Second Amended Counterclaim refer to documents which speak for themselves. To the extent that a response is required, NDOW denies the allegations.

9. NDOW admits that in 1924, the United States commenced an action in this Court for purposes of determining and quantifying the water rights of the Walker River ...

1 Indian Reservation. NDOW denies the remaining allegations of paragraph 9 of the
2 Second Amended Counterclaim.

3 10. NDOW admits that the final judgment entered in *United States of America*
4 *v. Walker River Irrigation District, et al.*, In Equity No. C-125 (D. Nev.) on April 14, 1936,
5 as amended on April 24, 1940 (the “Decree”), includes a right of the United States of
6 America for the Walker River Indian Reservation. NDOW admits that the Decree did not
7 adjudicate groundwater rights; however, the Decree is the best evidence of its provisions,
8 and speaks for itself. NDOW denies the remaining allegations in paragraph 10 of the
9 Second Amended Counterclaim.

10 11. On information and belief, NDOW admits that since April 14, 1936, persons
11 and entities have appropriated water from sources within the Walker River Basin
12 pursuant to and consistent with the laws of the State of Nevada and the State of
13 California. NDOW lacks sufficient information to admit or deny the allegations contained
14 in paragraph 11 of the Second Amended Counterclaim, and on that basis, denies them.

15 12. NDOW lacks sufficient information to admit or deny the allegations
16 contained in paragraph 12 of the Second Amended Counterclaim, and on that basis,
17 denies them.

18 13. NDOW lacks sufficient information to admit or deny the allegations
19 contained in paragraph 13 of the Second Amended Counterclaim, and on that basis,
20 denies them.

21 14. NDOW denies the allegations in paragraph 14 of the Second Amended
22 Counterclaim.

23 15. The allegations in paragraph 15 of the Second Amended Counterclaim
24 consist of legal conclusions that do not require a response. To the extent that a response
25 is required, NDOW denies them.

26 16. NDOW admits that Paragraph XIV of the Decree includes provisions
27 pursuant to which the Court retained jurisdiction of the “cause.” The Decree as
28 ...

1 amended is the best evidence of, and speaks for itself, with respect to the content of its
2 Paragraph XIV.

3 **FIRST CLAIM FOR RELIEF**

4 17. Paragraph 17 is an incorporation by reference and requires no response.

5 18. The allegations in paragraph 18 of the Second Amended Counterclaim
6 consist of legal conclusions that do not require a response. To the extent a response is
7 required, NDOW denies them.

8 19. The allegations in paragraph 19 of the Second Amended Counterclaim
9 consist of legal conclusions that do not require a response. To the extent a response is
10 required, NDOW denies them.

11 **SECOND CLAIM FOR RELIEF**

12 20. Paragraph 20 is an incorporation by reference and requires no response.

13 21. The allegations in paragraph 21 of the Second Amended Counterclaim
14 consist of legal conclusions that do not require a response. To the extent a response is
15 required, NDOW denies them.

16 22. NDOW denies the allegations in paragraph 22 of the Second Amended
17 Counterclaim.

18 23. NDOW denies the allegations in paragraph 23 of the Second Amended
19 Counterclaim.

20 **THIRD CLAIM FOR RELIEF**

21 24. Paragraph 24 is an incorporation by reference and requires no response.

22 25. NDOW admits that groundwater is available for appropriation subject to
23 existing rights. The remaining allegations contained in paragraph 26 of the Second
24 Amended Counterclaim consist of legal conclusions that do not require a response. To the
25 extent a response is required, NDOW denies them.

26 26. NDOW denies the allegations contained in paragraph 26 of the Second
27 Amended Counterclaim.

28 ...

27. NDOW denies the allegations contained in paragraph 27 of the Second Amended Counterclaim.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Second Amended Counterclaim fails to state a claim upon which relief may be granted.

Second Affirmative Defense

The Second Amended Counterclaim is, by reason of the Decree, barred by the doctrines of claim preclusion, issue preclusion and/or other principles of finality as set forth in *Nevada v. United States*, 463 U.S. 110 (1983) and in *Arizona v. California*, 460 U.S. 605 (1983).

Third Affirmative Defense

“General Principles of finality and repose” that apply to water rights decrees, *Arizona v. California*, 460 U.S. 605, 619 (1983), preclude Paragraph XIV of the Decree from being construed as authorizing the modification of the Decree to recognize additional reserved water rights for the Tribe that were not recognized and established in the Decree.

Fourth Affirmative Defense

The Second Amended Counterclaim is barred by the doctrine of laches.

Fifth Affirmative Defense

The Second Amended Counterclaim barred by the doctrine of estoppel.

Sixth Affirmative Defense

Through commencement and resolution of claims against the United States by the Walker River Paiute Tribe, the Second Amended Counterclaim and each and every claim for relief stated therein have been waived, and are therefore extinguished.

Seventh Affirmative Defense

A federal reserved water right exists only if “necessary” to fulfill the *primary* purpose – as opposed to the *secondary* purposes – of the federal reserved lands,

1 *United States v. New Mexico*, 438 U.S. 696, 700–702 (1978), and only to the extent
2 necessary to meet the “minimal need” of the federal reservation, “no more.” *Cappaert v.*
3 *United States*, 426 U.S. 200, 141 (1976). The Tribe has failed to allege or show that the
4 water granted to the Tribe in the Walker River Decree is insufficient to meet the primary
5 purposes for which the lands were added to the Walker River Indian Reservation, and the
6 additional water from any source is “necessary” to fulfill the primary purposes of such
7 added lands. Thus, the Tribe does not have a reserved right to additional water for the
8 lands that have been added to the reservation.

9 **Eighth Affirmative Defense**

10 Under the implied reservation of water doctrine, the United States may not reserve
11 water from a water source that is not within the lands which are being reserved. To the
12 extent that the Second Amended Counterclaim and any claim for relief therein seeks
13 water from a source for lands which did not include that water source at the time of
14 reservation, no such claim can be made.

15 **Ninth Affirmative Defense**

16 The primary purpose of adding lands to the Walker River Indian Reservation from
17 1918 to 1972 was for purposes of dry land grazing, which requires no water for irrigation
18 and only sufficient stockwater for livestock which can be reasonably grazed on such lands.

19 **Tenth Affirmative Defense**

20 The implied reservation of water rights doctrine does not apply to the conservation
21 storage of water, including, but not limited to, storage for any purpose, including
22 carryover and conservation.

23 **Eleventh Affirmative Defense**

24 The implied reservation of water rights doctrine does not apply to groundwater.

25 **Twelfth Affirmative Defense**

26 If the implied reservation of water rights doctrine applies to groundwater, it does
27 so only in circumstances where it is established that there is insufficient surface water to
28 otherwise satisfy the claimed reserved water right. The water right provided for the

Walker River Indian Reservation by the Decree is sufficient to accomplish the purposes for which lands were added to the Reservation.

Thirteenth Affirmative Defense

To the extent that this Court determines that any addition of land to the Walker River Indian Reservation resulted in the reservation of water, the use of that water must be restricted to the use impliedly contemplated at the time the land was added to the Reservation, and any change to that use is subject to the provisions of Paragraph X of the Decree and to the Administrative Rules and Regulations Regarding Change of Point of Diversion, Manner of Use or Place of Use of Water of the Walker River and Its Tributaries.

Fourteenth Affirmative Defense

NDOW reserves the right to amend this answer as additional affirmative defenses are discovered.

WHEREFORE, the Nevada Department of Wildlife prays for judgment against the Walker River Paiute Tribe as follows:

1. That the Second Amended Counterclaim be denied and dismissed;
2. For its costs of suit allowed by law; and
3. For such other and further relief as the Court deems just and proper.

DATED this 1st day of August, 2019.

AARON D. FORD
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 1st day of August, 2019, I electronically filed the foregoing DEPARTMENT OF WILDLIFE'S ANSWER TO SECONDED AMENDED COUNTERCLAIM, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record

/s/ Sandra Geyer
SANDRA GEYER